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UNITED STATES OF AMERICA

v.

DAVID MATTHEW HICKS

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) **PROSECUTION**  
) **RESPONSE TO DEFENSE**  
) **MOTION FOR A BILL OF**  
) **PARTICULARS**  
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)  
) 4 October 2004  
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1. Timeliness. This response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense request should be denied in its entirety.

3. Facts

a. The President's Military Order of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals "for any and all offenses triable by military commission."

b. The President determined that the Accused is subject to this Military Order on 3 July 2003.

c. The Appointing Authority approved the charges in this case on 9 June 2004 and on 25 June 2004 referred the same to this military commission in accordance with commission orders and instructions.

d. From December 2003 until the present, the Defense has been provided over 2,400 unclassified and classified documents in discovery, including audio, video, and CD ROMs containing multiple items.

4. Discussion

a. Indictments Generally

(1) U.S. Courts.

American federal criminal practice is guided by the Federal Rules of Criminal Procedure. These rules state that "the indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." *Fed. R. Crim P. Rule 7 (c) (1)*. Case law has explained that the charging indictment must inform defendants of the nature and cause of the accusation to permit preparation of a defense and must equip defendants with sufficient facts to

plead former jeopardy in a subsequent prosecution for the same offense. *United States v. Contris*, 592 F.2d 893 (5th Cir. 1979). See also 8 Moore's Federal Practice P 7.04 at 7-15 (rev. 2d ed. 1978).

[The US Supreme Court] has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged,' and sufficiently apprises the defendant of what he must be prepared to meet,' and, secondly, 'in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

*Russell v. United States*, 369 U.S. 749 at 764 (quoting *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34. *Hagner v. United States*, 285 U.S. 427, 431. See *Potter v. United States*, 155 U.S. 438, 445; *Bartell v. United States*, 227 U.S. 427, 431; *Berger v. United States*, 295 U.S. 78, 82; *United States v. Debrow*, 346 U.S. 374, 377-378).

## (2) International Criminal Courts

The standard is identical in international criminal law. For instance, in the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), rules state that an indictment must be a "concise statement of the facts and the crime or crimes with which the accused is charged under the statute." ICTY Article 18(4); ICTR Article 17(4). See also *Prosecutor v Tadic*, IT-94-1-PT, *Decision on Defence Motion on Form of Indictment*, 14 Nov. 1995. Applying this rule and its companion rule ICTY Article 47(c), an ICTY Trial Chamber opined:

The indictment should articulate each charge specifically and separately, and identify the particular acts in a satisfactory manner in order to sufficiently inform the accused of the charges against which he has to defend himself.

*Prosecutor v. Delalic et al*, IT-96-21-A, *Decision on Defence Motion on Form of Indictment*, 15 Nov. 1996 (affirming its previous decision on the same motion). The same Chamber also stated that criminal indictments should be "very succinct, [and should] demonstrate ... that the accused allegedly committed a crime." *Delalic Indictment Decision*, 2 Oct. 1996, p. 11 (quoting the *Dukic Preliminary Motions Decision*, 16 Apr. 1996, para. 14.

The International Criminal Court's (ICC) Rome Statute ("Rome Statute") provides a pre-trial hearing procedure for confirming the charges before a special "pre-trial chamber." See Rome Statute Article 61. See also Rome Statute Articles 56 – 60 (explaining the role of the Pre-Trial Chamber). At this hearing, the Prosecutor gives the accused person a copy of the charges against him, and informs that person and the pre-trial chamber of the evidence intends for use at trial.<sup>1</sup> This review or approval process of the charges is akin to our commission law process

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<sup>1</sup> The ICC's Rome Statute also provides that the arrest warrant for a person to be summoned before the Court shall contain "[a] concise statement of the facts with are alleged to constitute the crime." See Rome Statute Article 58 §§ 2 (c), 3(c) and 7(d). This requirement essentially tracks the language and notice requirements found in US, ICTY, and ICTR law regarding indictments. *Supra*.

whereby the Prosecutor transmits the charges to the appointing authority for approval. *See* MCO No. 1 §§ 4(B)(2)(a) and 6(A)(1) *et. seq.*

b. Requests for Bills of Particular

In American law, “a bill of particulars is not a matter of right.” 1 Charles Alan Wright, Federal Practice and Procedure § 129, at 648 (3d ed. 1999) (citations omitted). The decision to order a requested bill of particulars is a decision that rests within the sole discretion the court. *See United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citing *United States v. Barnes*, 158 F.3d 662, 665-66 (2d Cir. 1998)). In deciding whether a bill of particulars is needed, the standard that the court must apply is “*whether the information sought has been provided elsewhere, such as in other items provided by discovery*, responses made to requests for particulars, prior proceedings, and the indictment itself.” *United States v. Strawberry*, 892 F. Supp. 519, 526 (1995) (emphasis added) (citing *United States v. Feola*, 651 F. Supp. 1068, 1133).

US courts have specifically noted that the proper scope and function of a bill of particulars is not to obtain disclosure of evidence or witnesses to be offered by the Government at trial, but to minimize surprise, to enable an accused to obtain such ultimate facts as are needed to prepare his defense, and to permit a defendant successfully to plead double jeopardy if he should be prosecuted later for the same offense. *See United States v. Salazar*, 485 F.2d 1272, 1278 (2d Cir. 1973), cert. denied, 415 U.S. 985, 94 S. Ct. 1579, 39 L. Ed. 2d 882 (1974). A bill of particulars should be required only where the charges of the indictment are so general that they do not advise the defendant of the specific acts of which he is accused. *See United States v. Ramirez*, 602 F. Supp. 783 (S.D.N.Y. 1985). Thus, courts have refused to treat a bill of particulars as a general investigative tool for the defense, or as a device to compel disclosure of the Government's evidence or its legal theory prior to trial. *See United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

Specifically addressing requests for a bill of particulars in conspiracy cases, U.S. Courts have opined that a motion for bill of particulars as to precisely when, where, and with whom a conspiracy agreement was formed, detailed facts, and precise parts which defendant and his alleged coconspirators played in forming and executing the conspiracy should be denied because the information sought by defendant was evidentiary in nature and that it is not function of bill of particulars to provide detailed disclosure of the government's evidence in advance of trial. *Wong Tai v. United States*, 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545 (1927); *Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968); *United States v. Rosenfeld*, 264 F. Supp. 760, 762 (N.D.Ill.1967); *United States v. Trownsell*, 117 F. Supp. 24, 26 (N.D.Ill.1953); *United States v. Bozza*, 234 F. Supp. 15, 16-17 (E.D.N.Y.1964); *United States v. Gilboy*, 160 F. Supp. 442, 456 (M.D.Pa.1958). *United States v Cullen* 305 F Supp 695, (E.D. Wis. 1969).

International courts follow an identical analysis when reviewing challenges to indictments where defendants request more particulars about the charges against them. For example, the ICTY has opined that the primary purpose of the indictment is to notify the accused the nature of the charges, “in a summary manner,” and present the accused with a factual basis of the charges. *See e.g. Prosecutor v. Blaskik*, IT-95-14, *Decision on the Accused's form of the Indictment Motion*, 4 Apr. 1997. But, the Tribunal has also endorsed the notion of a motion for particulars when necessary. *See Tadic at 8*. In the *Tadic* case, *inter alia.*, the defense argued that

several paragraphs of the indictment were vague because they only listed approximate dates thereby depriving the accused of a clear indication of the charges against him. *Id.* The Trial Chamber found that the approximate dates listed fulfilled the requirement of the Rules. *Id.* In arriving at its decision, the *Tadic* Trial Chamber stated that requests for particulars must "specify the counts in question, the respect in which it is said that the *material already in the possession of the Defence is inadequate*, and the particulars necessary to remedy that inadequacy." *Id.* (emphasis added). ICTY Trial Chambers have often utilized the analysis of this *Tadic* decision when addressing the need for further particulars. See e.g. *Prosecutor v. Dukic*, IT-96-20-T *Decision on Preliminary Motions of the Accused*, 26 Apr. 1996; *Delalic et. al*, IT-96-21-T, *Decision on the Accused Mucic's Motion for Particulars*, 26 Jun. 1996.

As in American law, the ICTY is also of the opinion that a "request for particulars is not, and may not be used as, a device to obtain discovery of evidentiary matters" and that requests for particulars "is not a substitute for pre-trial discovery." *Delalic et. al*, 26 Jun. 1996 at ¶ 9. It is the process of providing discovery that assures the defense of protection against prejudicial surprise at trial and gives it adequate information to properly prepare its defense at trial. *Id.*

In the case at bar, not only has the charge sheet been transmitted to the Appointing Authority, and been reviewed for legal sufficiency by his legal advisor, but it is also a concise statement of the charges and the underlying facts for which the accused is charged in accordance with Commission Law. See e.g. MCO No.1 and MCI No. 2. Commission Law does not require a more definite charge sheet, but clearly, as it has been drafted, approved and referred to this Commission, the charge sheet meets and exceeds the standards followed in American Law (the rules of criminal procedure and federal case law) and in International Law, specifically the ICTY, ICTR, and the ICC discussed above.

From December 2003 until the present, the Defense has been provided with over 2,400 documents. Some of the documents provided are digital media, including video, audio, and CD ROMs containing multiple pages of documents. As such, there is no surprise awaiting the defense as to the dates, locations, and persons related to the accused regarding the crimes in which he is charged. The Prosecution has given the Defense all statements which the Accused has made, to include his written, sworn confession. These statements, along with all the other evidence, provides the defense with more than adequate information necessary to prepare a Defense clear of double jeopardy type concerns or surprise at trial. The Defense's request for a bill of particulars is unwarranted and therefore should be denied.

5. Oral Argument. The Prosecution requests the opportunity to respond to Defense arguments, if oral argument is granted.

6. Legal Authority.

#### **Commission Law**

MCO No. 1

MCI No. 2.

## **US Law**

*Fed. R Crim P, Rule 7 (c) (1).*

*United States v. Contris*, 592 F.2d 893 (5th Cir. 1979)

*Russell v. United States*, 369 U.S. 749 at 764

*United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999)

*United States v. Strawberry*, 892 F. Supp. 519, 526 (1995)

*United States v. Salazar*, 485 F.2d 1272, 1278 (2d Cir. 1973)

*United States v. Ramirez*, 602 F. Supp. 783 (S.D.N.Y. 1985)

*United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974)

*Wong Tai v. United States*, 273 U.S. 77, 82, 47 S. Ct. 300, 71 L. Ed. 545 (1927);

*Overton v. United States*, 403 F.2d 444, 446 (5th Cir. 1968)

*United States v. Rosenfeld*, 264 F. Supp. 760, 762 (N.D.Ill.1967)

*United States v. Trowsell*, 117 F. Supp. 24, 26 (N.D.Ill.1953)

*United States v. Bozza*, 234 F. Supp. 15, 16-17 (E.D.N.Y.1964)

*United States v. Gilboy*, 160 F. Supp. 442, 456 (M.D.Pa.1958)

*United States v Cullen* 305 F Supp 695, (1969, ED Wis.)

## **ICTY/ICTR Law**

ICTR Article 17(4) < <http://www.un.org/icty/legaldoc/index.htm>>

ICTY Article 18(4). < <http://www.un.org/icty/legaldoc/index.htm>>

ICTY Article 47(c) <<http://www.icty.org/ENGLISH/basicdocs/statute.html>>

*Prosecutor v Tadic*, IT-94-1-PT, *Decision on Defence Motion on Form of Indictment*, 14 Nov. 1995. <<http://www.un.org/icty/tadic/trialc2/judgement/>>

*Prosecutor v. Delalic et al*, IT-96-21-A, *Decision on Defence Motion on Form of Indictment*, 15 Nov. 1996 <<http://www.un.org/icty/celebici/trialc2/decision-e/61115FI2.htm>>

*Delalic et. al*, IT-96-21-T, *Indictment Decision*, 2 Oct. 1996, p. 11  
< <http://www.un.org/icty/celebici/trialc2/decision-e/61002FI2.htm>>

*Prosecutor v. Blaskic*, IT-95-14, *Decision on the Accused's form of the Indictment Motion*, 4 Apr. 1997. < <http://www.un.org/icty/blaskic/trialc1/decisions-e/70404DC113291.htm>>

*Prosecutor v. Dukic*, IT-96-20-T *Decision on Preliminary Motions of the Accused*, 26 Apr. 1996 <<http://www.un.org/icty/transe20/960426MH.htm>>

*Delalic et. al*, IT-96-21-T, *Decision on the Accused Mucic's Motion for Particulars*, 26 Jun. 1996. < <http://www.un.org/icty/celebici/trialc2/decision-e/60626MS2.htm>>

## **ICC Law**

International Criminal Court's Rome Statute 56 – 61  
<<http://www.un.org/law/icc/statute/romefra.htm>>

## **Treatises**

8 Moore's Federal Practice P 7.04 at 7-15 (rev. 2d ed. 1978).

1 Charles Alan Wright, Federal Practice and Procedure § 129, at 648 (3d ed. 1999)

7. Witnesses/Evidence. The Prosecution does not foresee the need to present any witnesses or further evidence in support of this motion.
8. Additional Information. None.

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XXXX  
Major, U. S. Army  
Prosecutor